FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2008-20

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Dear Messrs. Bopp, Coleson, and Callen:

We are responding to your advisory opinion request on behalf of the National Right to Life Committee, Inc. ("NRLC"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to NRLC's request to reimburse its separate segregated fund, the National Right to Life Political Action Committee ("NRLCPAC").

The Commission concludes that NRLC may reimburse NRLCPAC for the costs of broadcasting a radio advertisement that the Commission allowed NRLC to finance from general treasury funds in Advisory Opinion 2008-15 (National Right to Life Committee).

***Background***

The facts presented in this advisory opinion are based on your letter received on December 1, 2008, and Advisory Opinion 2008-15, which is related to your present request.

NRLC is a non-stock, not-for-profit corporation, exempt from Federal taxes under 26 U.S.C. 501(c)(4). In Advisory Opinion 2008-15, the Commission considered whether NRLC could finance the broadcast of two sixty-second radio advertisements

with general treasury funds. On November 24, 2008, the Commission concluded NRLC could use general treasury funds to finance the broadcast of one of the two advertisements, entitled "Waiting for Obama's Apology #1" ("Apology #1"). *See* Advisory Opinion 2008-15 (NRLC). The Commission did not approve a response for the other advertisement, entitled "Waiting for Obama's Apology #2," and the requestor does not raise any issues here relating to that advertisement.[1]

On October 28, 2008, NRLC's separate segregated fund, NRLCPAC, began broadcasting the radio advertisement Apology #1. NRLC states that NRLCPAC financed the broadcast out of legal precaution while NRLC awaited the Commission's decision in Advisory Opinion 2008-15. NRLCPAC spent $69,271.56 broadcasting the advertisement between October 28 and November 24, the date the Commission issued Advisory Opinion 2008-15. NRLC now wants to reimburse NRLCPAC for the funds it spent broadcasting the advertisement Apology #1 between October 28 and November 24.[2]

***Question Presented***

*May NRLC reimburse NRLCPAC for the costs involved in broadcasting the radio advertisement that the Commission concluded in Advisory Opinion 2008-15 NRLC could finance with general treasury funds?*

***Legal Analysis and Conclusions***

Yes, NRLC may reimburse NRLCPAC for the costs involved in broadcasting the radio advertisement Apology #1 between October 28, 2008, and November 24, 2008.

The Act prohibits a corporation from making contributions or expenditures in connection with any Federal election. 2 U.S.C. 441b(a). The term "contribution or expenditure" is defined to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization," in connection with any Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1).

The Commission concluded in Advisory Opinion 2008-15 that NRLC could finance the broadcasting of Apology #1 from general treasury funds. NRLC, therefore, is asking to reimburse NRLCPAC for costs that NRLC was permitted to pay directly under the Act.

The Commission previously has allowed a reimbursement in an analogous situation. In Advisory Opinion 1979-33 (District 1199-C Political Action Fund), a

[1] The Commission described the content of NRLC's proposed advertisements in Advisory Opinion 2008-15 and will not repeat it here.

[2] The Commission notes that the attachment to NRLC's advisory opinion request, which NRLC claims to transcribe the Commission's October 23, 2008, public meeting, is not an official transcript of the meeting. Thus, the Commission does not vouch for the accuracy of the attachment, nor does the Commission rely on any part of the attachment in this advisory opinion.

separate segregated fund ("SSF") of a labor organization paid for a banquet that the labor organization mistakenly believed to constitute political campaign activity. The money, instead, was to be used for non-partisan get-out-the-vote activities, and thus was exempt from the Act's definition of a "contribution or expenditure" in 2 U.S.C. 441b. The Commission allowed the labor organization to reimburse the SSF because the labor organization could have financed the dinner directly without violating the Act. Although the SSF, under a mistaken belief, initially paid for the dinner, the Commission concluded that it did not change the characterization of the money as a payment for an exempt activity under section 441b. In this case, NRLC, like the labor organization in Advisory Opinion 1979-33, could have financed the activity with general treasury funds without violating the Act. The fact that NRLCPAC initially paid for the advertisement broadcast, while NRLC awaited the Commission's advisory opinion, does not change the characterization of the cost as one that NRLC was permitted to pay directly.

Similarly, the Commission has allowed a State party committee to transfer funds from a non-Federal account to a Federal account when the transfer would have been lawful if deposited directly into the Federal account. In Advisory Opinion 1990-27 (Connecticut Republican Party), a campaign committee transferred excess campaign funds to a State party, which mistakenly deposited the funds into a State account instead of a Federal account in violation of State law. Under a conciliation agreement with a State commission, the funds were moved to an escrow account and the State party then asked the Commission whether those escrowed funds could be transferred to its Federal account. The Commission noted that transfers from a State account to a Federal account were prohibited by 11 CFR 102.5(a)(1)(i). The Commission, however, allowed the transfer in that particular case because the funds at issue were excess campaign funds of a candidate that could be lawfully transferred to any Federal political party committee, so the transfer itself was lawful. Significantly, the funds could have been deposited into the Federal account at the time of the transfer.

NRLC could have financed the advertisement broadcast at the time when, out of legal precaution, it decided to use NRLCPAC funds to finance the broadcast. The underlying act, therefore, as in Advisory Opinion 1990-27, would have been lawful. *See also* Advisory Opinion 1990-29 (Joseph E. Seagram & Sons, Inc.) (explaining that the "decision to allow the transfer of non-Federal election funds to a Federal account in specific situations is premised largely on the legality, under the Act, of the transferred funds"); Advisory Opinion 2002-08 (David Vitter for Congress Committee) (allowing a transfer of funds from a non-Federal account to a Federal account).

The Commission's conclusion in this advisory opinion also is consistent with its statement in a recent public court filing. In a legal memorandum to the D.C. District Court, the Commission noted that a corporation could use its separate segregated fund to finance a disputed communication and then seek permission to reimburse the fund should the corporation prevail in the litigation. *See* Federal Election Commission's Memorandum in Opposition to Plaintiff's Second Motion for Preliminary Injunction at 24, *Citizens United v. FEC*, 2008 WL 2788753, No. 1:07-cv-2240-RCL (D.D.C. July 18, 2008). The Commission reasoned that this situation was similar to a litigant placing

disputed funds into escrow during the pendency of litigation from which they could be paid if they succeeded on the merits.[3]

NRLC used its separate segregated fund, NRCLPAC, as a precaution against legal liability. To ensure compliance with the Commission's regulations, NRLCPAC financed the broadcast during the pendency of the advisory opinion process. NRLC is now asking for permission to reimburse costs NRLCPAC spent on the broadcast while NRLC awaited the Commission's decision in Advisory Opinion 2008-15. The Commission believes NRLC should not be penalized for taking these precautionary measures to comply with the law.

For the foregoing reasons, the Commission concludes that, in the unique circumstances presented in this advisory opinion, NRLC may reimburse NRLCPAC for the costs involved in broadcasting the radio advertisement Apology #1 between October 28, 2008, and November 24, 2008.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material respects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission's Web site at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

(signed)
Steven T. Walther
Chairman

[3] *See e.g., National Treasury Employees Union v. United States*, 927 F.2d 1253, 1256 (D.C. Cir. 1991) (denying injunction in part because the plaintiffs could have placed funds into escrow during the pendency of the litigation).